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BRIEFS

Supreme Court, U.S.
FILED
JUN 13 2012
OFFICE OF THE CLERK

No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, ET AL.,
PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF ON REARGUMENT OF *AMICI CURIAE* INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. UNDER INTERNATIONAL LAW, A STATE HAS THE AUTHORITY, AND AT TIMES THE OBLIGATION, TO ASSERT ITS JURISDICTION EXTRATERRITORIALLY 6

A. The Basic Principles Governing the Exercise of Jurisdiction Recognize that States have Rights and Responsibilities Beyond Their Borders 6

B. International Law Recognizes Extraterritorial Jurisdiction under Longstanding Principles 9

II. THERE IS WIDE-SPREAD PRACTICE REFLECTING THE ACCEPTANCE OF EXTRATERRITORIAL JURISDICTION UNDER INTERNATIONAL LAW 18

A. The Rights and Responsibilities Assumed By States Through Their International Treaty Obligations Demonstrates Widespread Acceptance of the Exercise of Extraterritorial Jurisdiction 18

B. State Practice Demonstrates Widespread Acceptance of the Exercise of Extraterritorial 28

CONCLUSION 39

APPENDIX A
List of *Amici Curiae* A-1

TABLE OF AUTHORITIES

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Doe v. Unocal Corp.,
395 F.3d 932 (9th Cir. 2002) 30

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 2, 14, 15, 36

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Alien Tort Statute, 28 U.S.C. § 1350 ..... *passim*

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2011 Eur. Ct. H.R. 1092 (2011) 22

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(July 7, 2011) 38

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2012 I.C.J. 39 (Feb. 3) 13, 14

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[2011] EWCA Civ 1150 (Eng.)..... 30

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Dec. 30, 2009, Case No. 330891/Docket No.
HA ZA 09-0579 (Neth.) 33

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(Decision on Request to Compel Information
in Favor of the Plaintiff), May 23, 2012..... 35

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(FIDH Civil Compl.) Oct. 19, 2011..... 35

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Case IT-95-17/1-T, Dec. 10, 1998 12,13

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(No. 798/2007)..... 35

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to a Remedy and Reparation for Victims
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Human Rights Law and Serious Violations
of International Humanitarian Law,
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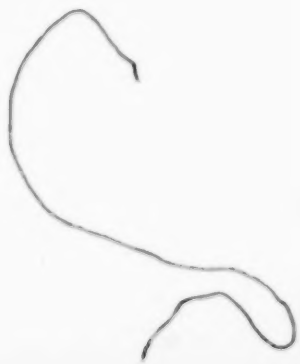

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Center for Constitutional Rights, Canadian Centre for International Justice, International Association of Democratic Lawyers, International Commission for Labor Rights, International Federation for Human Rights (FIDH), RAID, Redress Trust (REDRESS) and World Organisation Against Torture (OMCT) (listed in the Appendix) are international human rights organizations which have an interest in the proper understanding, assessment and application of adjudicative jurisdiction over a cause of action for violations of the law of nations occurring outside the territory of the adjudicating sovereign.

Amici regularly examine the scope of jurisdiction under international law and, in particular, the contours of extraterritorial jurisdiction, and have worked on numerous cases in the United States and foreign courts in which principles of extraterritorial jurisdiction have been adjudicated. *Amici's* understanding of international jurisdictional principles is properly informed by the international legal system's continued affirmation of legal principles committed to the elimination of impunity for grave human rights violations.

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[1] Written consents to the filing of *amicus curiae* briefs in support of either party are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

Amici write in support of Petitioners because the principles of jurisdiction under international law and State practice demonstrate that courts can, and regularly do, exercise jurisdiction over conduct occurring in another sovereign's territory. *Amici* stress that the recognition of extraterritorial jurisdiction, in the context of egregious conduct that violates international law, reflects an understanding that certain universally condemned conduct transcends borders and all States have the right and, in some cases the responsibility, to suppress and punish breaches.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides federal courts with jurisdiction "over any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States." This Court has found that the ATS recognizes a "modest number" of claims "based on the present-day law of nations" that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25, 732 (2004). Because the substantive law applied under the ATS is international law, it is appropriate to look to international law principles to address the question of extraterritorial jurisdiction.

The exercise of jurisdiction is a fundamental component of sovereignty. It includes the authority to prescribe rules, adjudicate rights and liabilities of

parties, and enforce judgments.[2] *See* Restatement § 401; Antonio Cassese, *International Law* 49 (2d. ed. 2005). The ATS does not apply *American* law, but rather provides jurisdiction over claims arising under *international law*. As such, it does not implicate prescriptive jurisdiction; it does not seek to apply or impose rules of conduct defined under American law extraterritorially. Rather, it is a form of adjudicative jurisdiction covering acts condemned by all nations.

This Court asked for supplemental briefing on the question, "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

Amici respectfully submit that international law permits courts to recognize a cause of action for violations that occurred within the territory of another sovereign under a number of longstanding and noncontroversial principles. This recognition, uniformly acknowledged by the most highly regarded jurists, is reflected in international treaties and borne out by State practice sufficient to establish a customary international law norm. This includes the

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[2] As discussed herein, the jurisdiction to adjudicate reflects "the power to settle legal disputes through binding decisions." *See, e.g.*, Restatement (Third) of the Foreign Relations Law, § 401(b) (1987) (jurisdiction to adjudicate is the power a State has to "subject persons or things to the process of its courts . . . whether in civil or criminal proceedings."); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. Law Rev. 785, 786 (1988).

exercise of jurisdiction over acts by foreigners against foreigners in foreign territory.

Various principles exist for asserting jurisdiction over particular conduct occurring extraterritorially, including the principle of universality. The principle of universality, in turn, recognizes that some conduct, defined under international law, is of such an egregious nature that it is condemned by all nations and can be adjudicated within the courts of all nations. The causes of action that arise under the ATS are generally of this nature, and accordingly, trigger U.S. responsibilities under the universality principle.

As set forth below, the application of a court's jurisdiction to matters that occurred in the territory of another sovereign is not only permissible under international law, but it is common, and, in some instances, obligatory. While courts regularly adjudicate civil matters based on a nexus to the territory, nationality of the victim or offender, and to protect national interests, courts also recognize and adjudicate violations of the law of nations based on the principle of universality. Adjudication under the universality principle, whether under criminal law with a concurrent proceeding allowing for recovery of damages by the victims or solely through civil proceedings, reflects the importance of ending impunity, by means of sanctioning and punishing those who violate fundamental rights. Moreover, it also recognizes the importance of providing victims with some measure of justice and redress.

It is undisputed that States may adjudicate conduct beyond their territory, including through civil claims, and that this is a principle derived from international custom or convention. Accordingly, there is no bar under international law to the recognition of a cause of action under the ATS that occurs within the territory of a foreign sovereign.

In the case of overlapping or competing jurisdictions, doctrines that inform choice-of-forum decisions, including *forum non conveniens,* provide the necessary guidance to courts. A discussion of this doctrine and others, including exhaustion of remedies, international comity, and act of state are beyond the scope of this brief. *Amici* submit, however, that courts must not decline jurisdiction without careful consideration of the availability and adequacy of proceedings in the alternate forum: "anything less" than a "readily accessible forum and fully effective remedies" should serve as a bar to transferring jurisdiction to another state, as it would "be inconsistent with the rationale for universal jurisdiction." Donald F. Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 159 (2006). To the extent that a court may decline to exercise its jurisdiction due to the existence of an overlapping or competing jurisdiction, such a decision reflects adherence to rules regarding choice-of-forum rather than a denial of extraterritorial jurisdiction as a matter of law.

ARGUMENT

I. UNDER INTERNATIONAL LAW, A STATE HAS THE AUTHORITY, AND AT TIMES THE OBLIGATION, TO ASSERT ITS JURISDICTION EXTRATERRITORIALLY.

A. The Basic Principles Governing the Exercise of Jurisdiction Recognize that States have Rights and Responsibilities Beyond Their Borders.

Extraterritorial application of the ATS fulfills crucial obligations of the United States that are rooted in the basic principles of international law. Jurisdiction is an expression of sovereignty. As such, the exercise of jurisdiction recognizes a State's rights and responsibilities to other States as well as to its nationals. In the modern era, with the emergence of human rights law and developments in international humanitarian law, jurisdictional principles recognize that States have responsibilities to members of the international community as a whole, including nationals of other States.

The most basic form of jurisdiction is territorial, i.e., commission of the conduct or the presence of the defendant are within the territorial borders of the State. At the same time, international law has long recognized that States are permitted to exert their jurisdiction beyond their territorial borders. As the Permanent Court of International Justice found in *The Case of S.S. 'Lotus'*, even when

international human rights and humanitarian law had not yet narrowed State's sovereign prerogatives, States were permitted to regulate matters outside their territory, unless otherwise prohibited by specific rules of international law. The P.C.I.J. found:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of the courts to persons, property and acts outside their territory, it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

The Case of S.S. 'Lotus' (*Fr. v. Turk.*), 1927 P.C.I.J., (ser. A) No. 10, at 19, ¶ 46 (Sept. 7).[3]

The P.C.I.J. identified the sources for such a "permissive rule" of extraterritorial jurisdiction as international custom or conventions.[4] *See id. See*

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[3] Thus, contrary to the view expressed in one *amicus* brief in support of Respondents, the starting point for examining the applicability of extraterritorial jurisdiction is that such adjudicative jurisdiction is permissible unless specifically prohibited; the view that extraterritorial jurisdiction is prohibited unless consent of nations to the specific exercise of such jurisdiction is identified misstates the rule under international law. *See* Br. of Chevron Corp. et al, as Amicus Curiae in Support of Resp't (No. 10-1491) (filed Feb. 3, 2012) ("Chevron Br.") at 10-17.

[4] The sources of international law are set forth in Article 38(1) of the Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993. *See* art. 38(1)(a) and (b).

also Cassese, *supra*, at 50. As demonstrated below, there exist both widespread acceptance in treaties and extensive State practice for the exercise of extraterritorial jurisdiction.

Indeed, the International Court of Justice recently recognized that "all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State." *Arrest Warrant of 11 April 2000,* 2002 I.C.J. 63, 77 ¶ 49 (separate opinion of Judges Higgins, Kooijmans and Buergenthal).

While the exercise of extraterritorial jurisdiction must respect the principles of non-intervention and the sovereign equality of States, those principles also operate within the context of a larger international legal framework that recognizes that the rights and responsibilities of States can, and in practice often do, transcend national borders. For this reason, it is recalled that the United Nations Charter also includes a duty to cooperate, particularly "in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]." U.N. Charter art. 1, para. 3. International cooperation, which includes extraterritorial acts or requests by States, is a critical component of the international legal system's overarching goal of eliminating impunity. *See* Special Rapporteur, *Fourth report on the obligation to extradite or prosecute* (*aut dedere aut judicare*), ¶ 13 Int'l Law Comm'n, U.N. Doc. A/CN.4/648 (May 31, 2011) (by Zdislaw Galicki). *See also, id.*, at ¶ 34 ("[I]t is indisputable that the fight against impunity for the

perpetrators of serious international crimes is a fundamental policy of the international community").

The assertion of extraterritorial jurisdiction generally requires a nexus between the State and the persons or conduct at issue, developing out of the rights and responsibilities of sovereignty. Such a nexus is found when the conduct violates *jus cogens* norms, the fundamental principles and values of the international community, which include conduct that the international community, through treaty or practice, has recognized as universally condemned, and over which it authorizes extraterritorial, including universal, jurisdiction. In such circumstances, a State is not exercising its jurisdiction for its own interests, but is promoting and vindicating the rights recognized by all States.

B. International Law Recognizes Extraterritorial Jurisdiction under Longstanding Principles.

International law recognizes jurisdiction, including extraterritorial jurisdiction, under a number of longstanding principles, including the nationality principle, the protective principle and the universality principle. *See* Ian Brownlie, *Principles of Public International Law*, 299-304 (6th ed. 2003); Cassese, *supra*, at 50. *See also* Restatement (Third) of Foreign Relations Law part 4. ch. 2, intro. note.

These principles do not serve as rigid categories for establishing jurisdiction, so much as they demonstrate that jurisdiction is permissible: "[i]t may be that each individual principle is only evidence

of the reasonableness of the exercise of jurisdiction." Brownlie, *supra*, at 305. In essence, what is required for jurisdiction is some "genuine or effective link" between the matter and the forum state. *Id. See also* Restatement § 403 (2).

The exercise of extraterritorial jurisdiction based on nationality is uncontroversial. Jurisdiction on this basis is grounded in the recognition of a State's right to regulate the behavior of its own nationals. *See Nottebohm* (*Liech. v. Guat.*), 1995 I.C.J. 4, 23 (Apr. 6) (nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.") Extraterritorial jurisdiction exercised on the basis of nationality can be in the form of "active personality" jurisdiction, which is based on the nationality of the defendant, and "passive personality" jurisdiction, which is based on the nationality of the victim. Brownlie, *supra*, at 301-02.

The protective principle has been invoked by courts to assert jurisdiction over "offenses that, although committed abroad, infringe upon or seriously affect national interests." Cassese, *supra*, at 50. The protective principle supports the exercise of jurisdiction over non-nationals for acts committed overseas to guard or vindicate the State's vital economic or political interests. Such jurisdiction has been applied in the areas of currency, espionage, falsification of official records, terrorism, national security and immigration. *See* Brownlie, *supra* at 302-03; Kenneth C. Randall, *Universal Jurisdiction*

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The universality principle explicitly envisions the exercise of jurisdiction for acts committed beyond territorial borders by foreigners against foreigners for acts that constitute serious breaches of international law. Cassese, *supra*, at 50. It reflects the recognition by the international community that some acts are so serious and violate such fundamental principles of the international system that they are of concern to the entire international community and warrant universal prosecution and repression. *Id.* Because the acts at issue involve fundamental principles of universal concern and violate *international* law, rather than simply the law of a particular nation, universality does not raise serious issues of interference with the internal affairs of a State and does not breach the principle of sovereign equality between States. *Id.*

Through treaty law and State practice, a growing number of violations have been identified as appropriate for adjudication under universal jurisdiction, including piracy, slavery, torture, war crimes, genocide and crimes against humanity. *See, e.g.*, Int'l Law Comm'n, Preliminary Report on the Obligation to Extradite or Prosecute (*"aut dedere aut judicare"*), UN Doc. A/CN4/571, 7 June 2006, at ¶40.

Violations of *jus cogens* norms create obligations *erga omnes*, or obligations which are owed to all States and all persons. The International Court of Justice recognized the special place that such

norms hold within the international legal system, and the ensuing obligations that flow from these norms:

> By their very nature, [some matters] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligations *erga omnes*. ... Among these rights for which there are *erga omnes* obligations are a number of fundamental rules protecting the "basic rights of the human person."

Barcelona Traction, Light and Power Company, Limited, Judgment, (*Belg. v. Spain*), ICJ Rep. 1970, p. 3, ¶34.

The International Tribunal for the former Yugoslavia reaffirmed this principle in the context of torture:

> the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.

Prosecutor v. Furundžija, Judgement, Case IT-95-17/1-T, Dec. 10, 1998, ¶ 151.

As the International Court of Justice recently explained, national courts have an indispensable role to play in ensuring these serious breaches of international law are punished:

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished . . . We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.

Case Concerning the Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belg.*) 2002 I.C.J. 63, 77 (Feb. 14) at ¶ 51 (separate opinion of Judges Higgins, Kooijmans, and Buergenthal).[5]

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[5] Sovereign or recognized personal immunities (i.e., head of state, diplomatic or consular immunity), which can present a distinct procedural bar to adjudicating claims over which a court would otherwise have proper jurisdiction, are beyond the scope of this brief. It is recalled, however, that the law of immunity is

While the principles of jurisdiction are discussed primarily in the context of criminal law, they are also applicable to civil proceedings. Brownlie, *supra*, at 298 (observing that there is no reason in principle to distinguish between the permissibility under international law of civil and criminal cases). *See also Sosa*, 542 U.S. at 761-62 (Breyer J., concurring). *See generally* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 Yale J. Int'l L. 1, 3 (2002) (explaining that each State translates its international law obligations into proceedings that are appropriate to its domestic civil and legal system).

Indeed, the close relationship between criminal sanctions and civil remedies is reflected in the *actiones populares* or *actions civiles* found in civil law systems. *See, e.g.*, Donovan & Roberts, *supra*, at 154. Through these mechanisms, civil claims are attached to criminal proceedings, thereby providing a basis for compensation which may not otherwise be quantified in a strict survey of universal civil jurisdiction laws. Notably, the civil torts actionable under the ATS are often identical with the criminal acts described under international law, and accordingly, the civil and criminal jurisdiction under international law are likewise congruent. [6]

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procedural in nature and does not alter the substantive rules of international law. *See, e.g., Arrest Warrant of 11 April 2000*, 2002 I.C.J. 3, ¶ 60, *cited in Jurisdictional Immunities of the State* (*F.R.G. v. Italy*), 2012 I.C.J. 39, ¶ 58 (Feb. 3).

[6] Rules of international law, such as rules regarding sovereign immunity or personal immunities, could be applied on

Moreover, awarding damages as a result of criminal proceedings serves the dual purposes of punishing the offender and providing some measure of redress to the victims; both of these purposes conform with the goals and values reflected in the universality principle.

As this Court recognized in *Sosa*, international law has evolved to proscribe other offenses beyond the original Blackstonian norms. 542 U.S. at 724-25. Historically, universal jurisdiction may have been limited to those serious crimes, such as piracy on the high seas and violation of ambassadorial immunities, which could evade prosecution under traditional bases of jurisdiction. In the modern era, the foundation of universal jurisdiction has been the "sheer heinousness of certain crimes" which are "universally condemned," and which all states have an interest in repressing. Donovan & Roberts, *supra*, at 143.

As the recognition of fundamental human rights has risen over the last seven decades, so has the concept of sovereign rights grown to encompass and acknowledge a system of international law that provides accountability and redress for violations of

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a case-by-case basis to bar certain claims, but such cases have no bearing on the question of extraterritorial jurisdiction. Notably, the cases cited by *amici* Chevron for the proposition that universal jurisdiction for torture applies only in criminal cases were dismissed not, as *amici* claim, because of a broad finding in each that a rule of international law bars extraterritorial jurisdiction over civil claims for torture but rather on sovereign or personal immunity grounds. *See* Chevron Br. at 14.

universal principles and norms. *Id.* at 142 ("Modern international law takes as a fundamental value the condemnation and redress of certain categories of heinous conduct"). *See id.* at 145.

Through a resolution of the General Assembly, the community of States recently affirmed that redress for victims is an existing and important component of international justice. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Preamble, U.N. Doc. A/RES/60/147(Dec. 16, 2005) ("Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law").

It would be contrary to the rules of international law to unreasonably constrict jurisdiction for such gross violations of international law or to place dispositive emphasis on territoriality. Indeed, in a recent report on extraterritorial jurisdiction, the International Bar Association explained that the growth of multinational corporations, eased global travel, technological developments, and transnational criminal enterprises "have combined to encourage states to exercise jurisdiction beyond their territorial borders." Int'l Bar Ass'n, Report of the Task Force on Extraterritorial

Jurisdiction 5 (Feb. 6, 2009), *available at* http://www.Ibabet.org ("IBA Report").

Recently, experts in international law and human rights convened to examine extraterritorial obligations, including in relation to transnational corporations. The result of this convening was the "Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights," adopted on September 21, 2011. Article 25 of the Maastricht Principles requires that States "adopt and enforce" measures, including legal measures when, *inter alia*, "any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law." Art. 25 (e).

Notably, the Commentary to the Maastricht Principles places the obligation to exercise extraterritorial jurisdiction not in the context of a challenge to State sovereignty, but rather in the framework of the mutual expression of States' interests, including to "facilitate the coexistence between States and their cooperation in addressing situations that are of concern to more than one, or (as regards peremptory norms of international law or international crimes justifying the exercise of universal jurisdiction) to the international community as a whole." Olivier De Schutter, Asbørn Eide, Ashfaq Khalfa, Marcos Orellana, Margot Salomon & Ian Siederman, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights* 34 Hum. Rts. Q. __ (2012) (forthcoming).

II. THERE IS WIDESPREAD PRACTICE REFLECTING THE ACCEPTANCE OF EXTRATERRITORIAL JURISDICTION UNDER INTERNATIONAL LAW.

There is widespread acceptance of extraterritorial jurisdiction reflected in the large number of international treaties that allow for, and in certain cases require, the exercise of jurisdiction beyond a State's territorial borders as well as by extensive State practice. As set forth below, customary international law recognizes the exercise of exterritorial jurisdiction over conduct occurring in foreign States.[7]

A. The Rights and Responsibilities Assumed By States Through Their International Treaty Obligations Demonstrates Widespread Acceptance of the Exercise of Extraterritorial Jurisdiction.

Numerous international treaties explicitly allow for, and at times require, that States exercise jurisdiction beyond their borders. Not only do they address a range of conduct over which States assert

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[7] In their extensive study on extraterritorial jurisdiction, the IBA Task Force identified the following three factors as relevant to determining customary international law: (i) legislation and treaties that permit, require or prohibit the exercise of jurisdiction in certain cases; (ii) decisions of national courts and regulatory bodies either exercising or refusing to exercise jurisdiction; and (iii) reactions of states' legislatures, courts and/or executives to the exercise of jurisdiction by other states. IBA Report, at 18.

extraterritorial rights or responsibilities, but the treaties are also widely accepted, signifying the customary nature of extraterritorial jurisdiction.

Most relevant to the present case are the international human rights and humanitarian law treaties which implicate the extraterritorial rights and responsibilities of States. These include the four Geneva Conventions of 1949, which require all Contracting Parties to enact domestic legislation to punish "grave breaches" of the Conventions.[8]

Recognizing the harm done to the international community as a whole by the commission of genocide, and seeking to deter its occurrence through the creation of a legal regime to foreclose impunity, the Genocide Convention calls upon all signatory States to prevent and punish genocide. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *See Application of the Convention on the Prevention and Punishment of the*

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[8] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287. *See also* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts [*hereinafter* Protocol I], art. 85, June 8, 1977, 1125 U.N.T.S. 3. The United States has signed but not ratified Protocol I, and it has been ratified by 17[illegible] States.

Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), ¶ 31 (July 11, 1996) (noting that "the obligation each State...has to prevent and to punish the crime of genocide is not territorially limited by the Convention"); *see also* Randall, *supra*, at 834-85. The Convention Against Apartheid contains similar provisions for universal jurisdiction. International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. 3, 4 and 5, Nov. 30, 1973, 1015 U.N.T.S.

Various human rights treaties include extraterritorial obligations, including provisions related to punishment and to providing redress. The International Covenant on Civil and Political Rights ("ICCPR") requires each State party to guarantee protection of the Covenant rights to "all individuals within its territory and subject to its jurisdiction." Sept. 8, 1992, 999 U.N.T.S. 171, art. 2(1).

The Human Rights Committee ("HRC") has interpreted this obligation to mean that State parties are required to respect and ensure the Covenant rights to all persons in their territory and to "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." *See* HRC, General Comment 31: Nature of the Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, § 10 (2004). The HRC has stated that "[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as

forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." *Id.* The HRC has also understood the ICCPR to require protection against the conduct of non-state actors, including private persons and entities. *Id.* (providing that State Parties should protect individuals not only against violations by its agents, "but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amendable to application between private persons of entities").

Article 2(3) of the ICCPR provides for access to and enforcement of an effective remedy determined by a competent authority. The HRC has emphasized the importance of State parties establishing adequate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. It has also noted that the judiciary can ensure the protection of the Covenant rights in various ways, including the direct application of the Covenant, the application of comparable constitutional or other provisions of law, or the interpretation of the Covenant through the application of national law. HRC, *supra*, at § 15.

Regional human rights regimes also recognize the necessary role of domestic courts in addressing human rights violations with an extraterritorial dimension. In a pair of decisions rendered in mid-2011, the European Court of Human Rights expanded its jurisdiction to apply the European Convention on Human Rights ("ECHR") outside the borders of its member states to address conduct that

occurred in Iraq. *See Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 18 (2011), *available at* http://www.unhcr.org/refworld/pdfid/4e2545502.pdf (finding that British government violated the right to life by failing to investigate the deaths of six Iraqis in Iraq); *Al-Jedda v. United Kingdom*, App. No. 27021/08, 2011 Eur. Ct. H.R. 1092 (2011), *available at* http://www.unhcr.org/refworld/docid/4e25466e2.html (finding that the British government violated the right to liberty and security). While these decisions related to violations by the State, victims could rely on these precedents to bring civil actions in British courts, or, indeed, other domestic courts of ECHR signatory States.

The Inter-American Commission on Human Rights ("Inter-American Commission") has understood the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man to have extraterritorial application. Under Article 1(1), the American Convention on Human Rights covers "all persons subject to [the] jurisdiction" of the State parties. The Inter-American Commission has held that a State party to the Convention "may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory." *Victor Saldaño v. Argentina*, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L/V/II.95 doc. 7 rev. at 289 ¶ 17 (1998). It has also found that "jurisdiction is a notion linked to authority and effective control, and not merely to territorial boundaries," and that the focus should be

on whether the State has "authority and control" over the person. *Id.* at ¶ 19. The American Declaration does not include a jurisdictional provision, but the Inter-American Commission has applied the same focus on "authority and control."[9]

The Inter-American Court of Human Rights has jurisdiction on all cases concerning the interpretation and application of the American Convention and is authorized to award reparations for violations. Article 63(1) of the American Convention on Human Rights provides:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

In light of the claims in the instant case, the most notable example is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85 (entered into force 26 June 1987). CAT specifically includes a provision calling upon signatory States to

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[9] *See, e.g., Coard et al v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. at ¶ 37 (1999); *Armando Alejandre Jr. and Others v. Cuba*, Case 11.589, Report No. 86/99, [OAS/Ser.L/V/II.104 doc. 10 rev. at] ¶ 23 (1999).

enact legislation to provide redress to victims of torture. Article 14 (1) of CAT provides: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."[10]

Moreover, CAT includes the principle of *aut dedere aut judicare* or the obligation to extradite or prosecute. *See* CAT, arts. 5, 7 and 8. *Aut dedere aut judicare* is closely related to the principle of universality, or universal jurisdiction, as the purpose of both is suppressing the commission of acts which harm the international community as a whole.[11]

Recent studies examining *aut dedere aut judicare* have found that signatory States are called upon to prosecute or extradite, including when the links of territory or nationality are absent, in a large number of treaties across a range of public and private international law matters, including currency, regulation of the high seas, air safety and

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[10] For a discussion on Article 14, see Supplemental Brief of Professor Juan Méndez, U.N. Special Rapporteur on Torture as Amicus Curiae Supporting Petitioners, Esther Kiobel v. Royal Dutch Shell Petroleum Co., Section I(B)(1). *See also* Committee Against Torture, 46th Sess., *Working Document on Article 14 for Comments* (June 3, 2011), *available at* http://www2.ohchr.org/english/bodies/cat/comments_article14.htm

[11] Elements of the protective principle as a basis for jurisdiction are also evident in certain of the treaties.

hijacking, narcotics, nuclear materials, terrorism and the regulation of warfare.[12] *See, e.g.*, Amnesty Int'l, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, AI Index IOR 40/001/2009, Feb. 3, 2009; Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, (The Graduate Inst., Geneva Publications, 2009) at http://iheid.revues.org/290; U.N. International Law

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[12] *See, e.g.*, Convention on Psychotropic Substances art. 22(2)(a)(v), Feb. 21, 1971, 1019 U.N.T.S. 175 ("Serious offences . . . committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable ... and if such offender has not already been prosecuted and judgement given."); Convention for the Suppression of Unlawful Seizure of Aircraft arts. [4(2), 6(1)-(2), 7], Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 ("Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution"); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (same); International Convention against the Taking of Hostages art. 8(1), Nov. 17, 1979, 1316 U.N.T.S. 205 (1985) (same); Convention on the Physical protection of Nuclear Material art. 10, Oct. 26, 1979, 1456 U.N.T.S. 101 (same); International Convention for the Suppression of Terrorist Bombings arts. [8(1)], Dec. 15, 1997, 2149 U.N.TS. 256 (same); International Convention for the Suppression of the Financing of Terrorism arts. 5, 7, Dec. 9, 1999, U.N. Doc. A/RES/54/109 (providing for territorial and active personality jurisdiction as well as when the terrorist acts are directed against a State, an organ of the State (at home or abroad), a national of the State or a stateless person residing in the state; such liability may be criminal, civil or administrative).

Commission, Survey of Multilateral Conventions on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", ¶4, U.N. Doc. A/CN.4/630 (June 18, 2010) (identifying 61 multilateral instruments, at the universal and regional levels, that include provisions to extradite or prosecute); IBA Report at 16-17.

One of the earliest conventions to include an "extradite or prosecute" clause is the 1929 International Convention for the Suppression of Counterfeiting Currency, which allows for punishment in the home State of nationals who committed crimes in another State as well as foreigners in the State where they are present for violations that were committed in the territory of another State. Apr. 20, 1929, 112 L.N.T.S. 371. Notably, the Convention specifically calls upon States to act over a foreigner present in a foreign state who committed an offense in a foreign state. *See* art. 9.[13] Commentary at the time of the adoption of the Convention regarding the reasoning for the Convention and its extraterritorial reach is instructive in considering mechanisms for implementing the commitment made by the community of States to end impunity:

> the existence of the conviction that the whole community of states had an interest in the repression of this form of criminality is what

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[13] This provision requires that extradition had been requested but could not be granted. *See also* 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S 301 (art. 7).

> made the agreement at all possible . . . the states had had occasion to observe that purely national action against counterfeiters was often insufficient, and that international action was in many cases extremely difficult, if not impossible. Thus, in the face of this common menace, with which separately the states were unable to cope, they came in time to realize that international cooperation was necessary, and what is more, that it was imperative, if they were to make any headway in the prevention and punishment of such crime. [...] one can trace the ramifications of the effects farther afield, but they are widespread when only one state has been both the scene and object of the crime.

Ernestine Fitz-Maurice, *Convention for the Suppression of Counterfeiting Currency: An* Analysis, 26 Am. J. Int'l L. 533, 533 (1932).

The International Convention for the Protection of All Persons from Enforced Disappearance, adopted on December 20, 2006 and entered into force December 23, 2010, is the most recent international treaty to contain an "extradite or punish" requirement. U.N. Doc. A/RES/61/177. The commission of the offence in the State, active personality, passive personality and the presence of the offender in the State if no extradition is forthcoming, all trigger the exercise of jurisdiction.[14]

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[14] Article 9(3) further provides that the Convention "does not exclude any additional criminal jurisdiction exercised in accordance with national law."

Id., art. 9. Notably, Article 24(4) also provides that each State "shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."[15]

B. State Practice Demonstrates Widespread Acceptance of the Exercise of Extraterritorial Jurisdiction.

State practice, in the form of legislation and judicial decisions, demonstrates the widespread acceptance of extraterritorial jurisdiction. The conduct over which such jurisdiction is exercised ranges from financial transactions to ordinary torts to the serious violations of international law over which the Alien Tort Statute provides jurisdiction. All bases of jurisdiction are implicated in this practice: the traditional territorial link alone or in combination with nationality, of either the offender or victim, is represented, as is practice that reveals the commitment of the international community of States to suppress and punish fundamental violations of international law.

Extraterritorial jurisdiction is regularly exercised over tort claims for conduct occurring in

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[15] Only one of the thirty-two parties to the Convention made a declaration on Article 24 and none made a reservation. Germany's declaration did not question imposing civil liability for acts that occurred outside its territory or against its citizens, but rather consisted of a simple clarification that the "provision on reparation and compensation does not abrogate the principle of state immunity."

territory other than that of the forum State under municipal law when one of the jurisdictional principles is satisfied, thereby making the exercise of jurisdiction reasonable. For example, in the United Kingdom, domestic tort law has been used as a vehicle for seeking accountability against business entities for human rights violations committed outside the State borders. *See, e.g., Lubbe v. Cape Plc.*, [2000] 1 WLR 1545 (H.L.) [¶2-4] (appeal taken from Eng.) (claims for damages of over 3,000 miners for exposure to asbestos and related products in the English parent corporation Cape's South African mines run by foreign subsidiaries); *Flores v. BP Exploration Co. (Colombia)*, Claim No. HQ08X00328 [Filed Dec. 1, 2008] EWHC (QB) (complaint against BP in Colombia for serious environmental harm with devastating impact on the local population); *Guerrero & Ors v. Monterrico Metals Plc.* [2010] EWHC 3228 [¶¶2-6, 11] (QB) (claims of 32 indigenous Peruvians against a British corporation, owned by a Chinese consortium and headquartered in Hong Kong for aiding and abetting torture by Peruvian police; settled out of court); *Connelly v. R.T.Z.* [1997] UKHL 30 [¶1-4] (cases against the British parent corporations for harms caused in Namibia by foreign subsidiaries).

Other common law countries have similar precedents. *See, e.g., Dagi v. BHP*, [1997] 1 VR 428 (Austl.) (suit in the Supreme Court of Victoria, Australia by 30,000 natives of Papua, New Guinea, for damages to their lands against a mining company domiciled in Australia); *see also Choc. v. Hudbay Minerals Inc.*, [2011] O.J. No. 3417 (Can. Ont. Sup.

Ct.) (QL) (suit by eleven Guatemalan women against HudBay and its subsidiary HMI Nickel Inc for claim of negligence resulting in *inter alia* assaults and gang rapes).

Indeed, as these examples demonstrate, many cases involving transnational activity brought under domestic law are similar to the fact patterns that arise in ATS cases. *See Prosecutor v TotalFinaElf et al.*, Cour de cassation de Belgique, Arrêt, 28 March 2007 PAS. No. P.07.0031.F (2007) (brought by Burmese residents in Belgium against the French oil company, Total, arising out of the same pipeline construction project at issue in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002)).

One recent case against a multinational corporation domiciled in the Netherlands, Trafigura, addressed the dumping of toxic waste by one of its ships (Probo Koala) off the coast of the Ivory Coast leading to the death of an estimated seventeen people and the sickening of thousands of people; this precipitated civil and criminal litigation in various jurisdictions, including the Ivory Coast, the Netherlands, the United Kingdom and France. *See, e.g., Motto & Ors v. Trafigura Ltd & Anor,* [2011] EWCA Civ 1150 [¶4-10] (Eng.) (Trafigura Ltd. is a British Subsidiary of Trafigura Beheer domiciled in the Netherlands); *see also* Nicola M.C.P. Jägers & Marie van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands*, 33 Brook. J. Int'l L. 833 (2008); *Trafigura Found Guilty of Exporting Toxic Waste*, BBC (July 23, 2010), *available at* http://www.bbc.co.uk/news/world-africa-10735255;

Joint FIDH-LIDHO-MIDH Report on the Trafigura Case (in French) (Apr. 2011), *available at* http://fidh.org/IMG/pdf/FIDH-LIDHO-MIDH_Rapport_ProboKoala_avril2011.pdf.

Canada has adjudicated cases that not only fit the fact pattern of ATS cases, but also incorporate international law into domestic practice. The Supreme Court of Canada has ruled that customary international law is a part of Canadian domestic law. *See R v. Hape*, [2007] 2 S.C.R. 292 ¶39 (Can.) ("[T]he doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada.").

In Quebec, which has a civil law system distinct from the common law system in the rest of Canada, the Superior Court has found that allegations of war crimes, namely violations of international law such as the Geneva Conventions, would be recognizable as a civil fault (i.e. tort) under the Quebec Civil Code. *See Bil'in (Village Council) v. Green Park Ltd.*, [2009] QCCS 4151, ¶ 175, 207-2012 (Can. Qué. Sup. Ct.), *aff'd*, 2010 QCCA 1455 (Can. Qué. C.A. ("A war crime is an indictable offence. As such, it is an imperative rule of conduct that implicitly circumscribes an elementary norm of prudence, the violation of which constitutes a civil fault"). The court further found that it had jurisdiction over Canadian corporations allegedly involved in war crimes committed in another country.

Id. at paras. 204-5 ("the Superior Court has jurisdiction over defendants domiciled in Québec regarding a civil action based on extracontractual liability for an injury caused and suffered in a foreign country.... Assuming for purposes of discussion that the Defendants knowingly assisted Israel for the purpose of committing a war crime as alleged, the Defendants committed a civil fault [tort] and are liable to appropriate civil remedies.") Although the dismissal of the case on *forum non conveniens* grounds was upheld by the Court of Appeal, the finding about extraterritorial jurisdiction was left untouched. *See Bil'in*, 2009 QCCS 4151, para. 15; *c.f.*, Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, ¶ 47 (holding *forum non conveniens* inconsistent with England's obligations under the Brussels Regulation).

In 2000, the exercise of jurisdiction by courts in the European Union for conduct that occurred in the territory of a foreign sovereign was partially codified. European Council Regulation No 44/2001 affirmed that corporations domiciled in any Member State of the European Union can be sued in the courts of that Member State for torts that occur outside their territory. EC Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Articles 2 and 60.[16] Council Regulation

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[16] Art. 2 provides: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Pursuant to Article 60(1) of the Brussels Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

44/2001, arts. 2, 60, 2001 O.J. (L 12) 3, 13. *See generally* FIDH, *FIDH Guide on Corporate Accountability for Human Rights Abuses* 204-214 (2010). *See also* Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 Geo. Wash. Int'l L. Rev. 939, 941 (2009) (national courts in the European Union have jurisdiction over any defendant corporation that is "domiciled" in the EU, irrespective of where the harm occurred or the nationality of the plaintiffs); *Oguru v. Royal Dutch Shell,* Court of The Hague, Dec. 30, 2009, Case No. 330891/Docket No. HA ZA 09-0579 (Neth.) (finding jurisdiction under Dutch law in conjunction with Article 60(1) of EC Regulation No. 44/2001 over claims brought by Nigerians against Shell for torts, arising out of oil spill in Nigeria involving Nigerian subsidiary) (English translation *available at* http://milieudefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma).

Moreover, courts of the EU Member States may consider claims arising out of foreign conduct against foreign defendants who have *no connection to the forum*, so long as they are co-defendants with a locally domiciled defendant and it would promote judicial efficiency to hear the claims together. Council Regulation (EC) No. 44/2001, art. 6(1), Dec. 22, 2000 ("A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts for the place where any one

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(a) statutory seat, or (b) central administration, or (c) principal place of business.

of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings").

A number of countries have amended their criminal codes to comply with their universal jurisdiction or *aut dedere aut judicare* obligations treaty obligations or their obligations as a State Party to the Rome Statute for the International Criminal Court. Twenty-seven member States of the European Union, as well as Norway and Switzerland, allow for extraterritorial jurisdiction over certain serious violations of international law based on the nationality of the defendant.[17] Each of these States also provides for universal jurisdiction over the same category of violations. *See* REDRESS/FIDH Extraterritorial Jurisdiction Report at 17.

Extraterritorial jurisdiction has been exercised in criminal cases over serious violations of international law. *See, e.g., Public Prosecutor v. Van Anraat*, Judgment, District Court of The Hague, LJN: AX6406, 09/751003-04, Dec. 23, 2005; Court of Appeal of The Hague, LJN: BA6734, 2200050906-2, May 9, 2007 (Neth.) (Dutch courts applied international law to convict Dutch man who had

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[17] REDRESS/FIDH, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, Dec. 2010 ("REDRESS/FIDH Report"), at 17. For an overview of which States include a presence requirement or take subsidiarity into account when determining jurisdiction, *see id.*, at 39.

supplied materials used in chemical weapons for complicity in war crimes committed against Kurds in Iraq);[18] *FIDH c/ Amesys* 387/12/23. *See Plainte Avec Constitution de Partie Civile* (FIDH Civil Compl.)(on file with author), Oct. 19, 2011; *Ordonnance Disant y Avoir Lieu à Informer* (Decision on Request to Compel Information in Favor of the Plaintiff), May 23, 2012 (on file with author); FIDH, Libya: Looking Back on the Amesys Case, May 29, 2012, http://fidh.org/Libya-Looking-back-on-the-Amesys (judicial investigation within the Paris Court in France against French corporation for violations including torture by the company that took place in Libya); *Khaled Ben Saïd* (Tunisian Viceconsul based in Strasbourg convicted for complicity of torture in France *in abstentia* for violations committed while head of police in Tunisia against a Tunisian national in 1996) REDRESS/FIDH Report, *supra*, at 134; *Scilingo*, S.T.S., Sala de lo Penal, Oct. 1, 2007 (No. 798/2007) (conviction in Spain for crimes against humanity committed in Argentina) REDRESS/FIDH Report, *supra*, at 240; *Jesuits Massacre Case* (indictment and arrest warrants issued in Spain for 20 Salvadoran ex-officers and former Salvadoran President, Alfredo Cristiani Burkard for their role in the "Jesuits Massacre" of Nov. 16, 1989 in El Salvador) *Id.* at 240. *see also*, http://www.cja.org/article.php?list=%20type&type=84#LEGAL%20PROCEEDINGS; *Duško Cvjetkovic* (case admissible in Austria against Bosnian Serb for genocide, murder and arson committed in Bosnia and

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[18] Van Anraat was convicted under Article 8 of the Criminal Law in Wartime Act. That law has been replaced by the comprehensive Dutch Code on International Crimes (2003).

Herzegovina) REDRESS/FIDH Report, *supra*, at 75; *Sylvere Ahorugeze* (Rwandan genocide suspect detained in Sweden for suspected genocide against Tutsis in Rwanda in 1994) *Id.*, *supra*, at 249; *Fayadi Zardad* (Afghan warlord convicted in United Kingdom for torture committed in Afghanistan in the 1990s under section 134 of the Criminal Justice Act) *Id.*, *supra*, at 267.

As noted above, certain civil law countries do not draw a clear distinction between criminal and civil proceedings, and instead allow for victims of a violation to seek damages from a defendant in a criminal case. *See, e.g., Sosa*, 542 U.S. at 762-63 (Breyer, J., Concurring); Amnesty Int'l, , *Universal Jurisdiction: The Scope of Civil Universal Jurisdiction*, AI Index: 53/008/2007, July 2007 http://www.amnesty.org/en/library/info/IOR53/%2000 8/2007 (finding that at least 24 states have provided their courts with universal civil jurisdiction in their national legislation: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Myanmar, Panama, Poland, Portugal, Romania, Senegal, Spain, Sweden and Venezuela); IBA Report, *supra*, at 120 (providing an illustrative list of 24 States which allow for civil claims to be made in the course of criminal proceedings: Argentina, Bolivia, Bulgaria, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, Netherlands, Norway, Panama, Poland, Romania, Russia, Senegal, Spain, Sweden and Venezuela); Robert C. Thompson, Anita Ramasastry & Mark B.

Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 886 (2009) (noting that some countries, including Japan, employ the mixed civil/criminal mechanism of *action civile* that allows a crime victim or his representative to seek tort damages in a criminal case); *See also* Arnaud Nuyts, Study on Residual Jurisdiction, Review of the Member States' Rules Concerning the "Residual Jurisdiction" of their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II ("EC Study of Residual Jurisdiction"), Prepared for the European Commission, Sept. 3, 2007, at ¶ 44, *available at* http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

Damages have been awarded to victims of egregious violations as a component of a criminal proceeding in a number of cases in national courts. *See, e.g.*, Press Release, FIDH, Ely Ould Dah Convicted After Six Years of Proceedings. Our Perseverance Paid Off!, FIDH (Dec. 10, 2008), http://fidh.org/Ely-Ould-Dah-convicted-after-six (accessed June 12, 2012) (civil decision granting reparation to parties *civiles* after the criminal conviction of Ely Ould Dah, Mauritian officer convicted for torture in France *in abstentia* for torture in Mauritania); FIDH, *Ely Ould Dah Condamné: Première condamnation pour torture en France fondée sur le mécanisme de compétence universelle* (Nov. 2005), http://www.fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf (awarding more than 68,500 euros to

victims of torture); Ann Riley, France Court Awards Bosnia Civil War Victims Damages for Injuries, Jurist (Mar. 14, 2011), *available at* http://jurist.org/paperchase/2011/03/france-court-awards-bosnia-civil-war-victims-damages-for-injuries.php (accessed June 12, 2012) (case against former Bosnian Serb President Radovan Karadžić and Biljana Plavšić where compensation of 200,000 euros was granted on the basis of civil claims); *Joseph Mpambra Case*, Judgment, LJN: BR0686, District Court The Hague, 22-0026 3-09, 212 (Neth.), (July 7, 2011), http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0686 (awarding compensation for human rights violations).

Finally, some states allow for the exercise of extraterritorial jurisdiction over civil claims when there exists no forum that can properly deliver justice or where there would be "unreasonable difficulty," due either to factual or legal obstacles, to bringing proceedings abroad (*forum necessitatis* or "forum of necessity"). *See, e.g.*, EC Study of Residual Jurisdiction, *supra*, at ¶¶ 83-86. *See also* Codigo de Processo Civil art. 65(1)(d) (Port.); REDRESS & World Organization Against Torture, *Written Comments as Intervenors in European Court of Human Rights Case* Nait Liman v. Switzerland (*No. 51357/07*), Sept. 15, 2011, at ¶23, http://www.redress.org/downloads/Nait%20Liman%20submission%20-%20Final.pdf (examples from 15 other countries). Notably, under this principle, The Netherlands does not require any connection between the forum and the parties or the conduct. *See*

El-Hojouj/Derbal, Rechtbank [Rb.] [Court of First Instance], The Hague, Mar. 21, 2012 (Neth.) (Palestinian plaintiff for serious violations occurring in Libya).

CONCLUSION

For all these reasons, this Court should find that there are no categorical territorial limitations on ATS jurisdiction.

Dated: June 13, 2012

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APPENDIX

APPENDIX A – LIST OF *AMICI CURIAE*

International Human Rights Organizations:

The **Canadian Centre for International Justice** (CCIJ) is a non-governmental organization in Canada dedicated to supporting survivors of genocide, torture and other atrocities in their pursuit of justice and seeking accountability for those who commit such acts. The CCIJ advocates for the criminal and civil prosecutions of those responsible for serious human rights violations, including corporations. The CCIJ is involved in civil litigation in Canadian courts and other efforts to hold Canadian companies accountable when they are alleged to be complicit in human rights abuses.

The **Center for Constitutional Rights** (CCR) is a nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Since its founding in 1966 out of the civil rights movement, CCR has litigated many international human rights cases under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, or served as amicus in ATS cases, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Statute grants federal courts jurisdiction to hear cases seeking compensation and other relief for violations of international law, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) and *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

The **International Association of Democratic Lawyers** (IADL) is a non-governmental Organization (NGO) with consultative status to ECOSOC and UNESCO. With members and member associations in 90 countries IADL lawyers work to promote human and peoples' rights. Since IADL's founding in 1946 in Paris, IADL members have worked to promote human rights of groups and individuals and oppose threats to international peace and security. IADL lawyers have sought the development of international law, and international humanitarian law, and have opposed impunity for crimes and violations of the laws of nations. IADL lawyers supported litigation against the corporations which manufactured Agent Orange which was used in the Vietnam War.

The **International Commission for Labor Rights** (ICLR) is a non-profit, non-governmental organization based in New York City, which coordinates the pro bono work of a global network of lawyers and jurists who specialize in labor and human rights law. ICLR's legal network also responds to urgent appeals for independent reporting on alleged labor rights violations, including violations by corporations. ICLR has addressed this issue in various reports and amicus briefs. ICLR is therefore interested in ensuring that there is a proper assessment and understanding of liability of corporations for violations of the laws of nations.

The **International Federation for Human Rights** (FIDH) is a federation of 164 Human Rights Organizations in more than 100 countries. Founded in 1922, FIDH co-ordinates and supports its member-leagues activities at the local, regional and international level. FIDH aims at obtaining effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy and litigation, FIDH has developed strict and impartial procedures which are implemented by world-renowned independent human rights experts. For more than a decade, FIDH has been focusing on the effects of globalization on the full recognition of human rights, and particularly the impact of business activities on economic, social and cultural rights. In this context, FIDH advocates for the recognition of the extra-territorial obligations of States, for greater corporate accountability and the rights of victims to reparation.

RAID is a research and advocacy not-for-profit organisation based in the United Kingdom. Since its foundation in 1997, RAID has conducted research into corporate accountability, human rights and extractive industries in developing countries. A particular focus of RAID's research is the Democratic Republic of Congo. RAID is a member of the Canadian Association against Impunity, an organisation that has filed a class action in Quebec against the Canadian company Anvil Mining Limited. It is alleged that the company, by providing logistical assistance, played a role in human rights abuses, including the massacre by the Congolese

military of more than 70 people in the Democratic Republic of Congo in 2004. RAID has made numerous submissions on corporate accountability issues to different parliamentary committees, the United Nations, the Organisation of Economic Cooperation and Development and other expert bodies.

The **Redress Trust** ('REDRESS') is an international human rights non-governmental organisation based in London with a mandate to assist torture survivors to prevent their further torture and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering and has advocated on behalf of victims from all regions of the world. Over the past 20 years, REDRESS has regularly taken up cases on behalf of individual torture survivors at the national and international level and provides assistance to representatives of torture survivors. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the United Nations' Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission of Human Rights, the International Criminal Court, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

Created in 1986, the **World Organisation Against Torture** (OMCT) is today the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel,

inhuman or degrading treatment. With 311 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is the most important network of NGO working for the protection and the promotion of human rights in the world.

Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights.

OMCT enjoys a consultative status with the following institutions: ECOSOC (United Nations), the International Labour Organisation, the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.